UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ANDRIA GRYCELL	:	
	:	
v.	:	C.A. No. 08-65A
	:	
MICHAEL J. ASTRUE, Commissioner of the Social Security Administration	:	

MEMORANDUM AND ORDER

This matter is before the Court for judicial review of a final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Supplemental Security Income ("SSI") benefits under the Social Security Act ("Act"), 42 U.S.C. § 405(g). Plaintiff filed her Complaint on February 26, 2008 seeking to reverse the decision of the Commissioner. On October 10, 2008, Plaintiff filed a Motion to Reverse the Decision of the Commissioner. (Document No. 9). On November 24, 2008, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (Document No. 11).

With the consent of the parties, this case has been referred to me for all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Based upon my review of the record and the legal memoranda filed by the parties, I find that there is substantial evidence in the record to support the Commissioner's decision and findings that Plaintiff is not disabled within the meaning of the Act. Consequently, I order that the Commissioner's Motion for an Order Affirming the Decision of the Commissioner (Document No. 11) be GRANTED and that Plaintiff's Motion to Reverse the Decision of the Commissioner (Document No. 9) be DENIED.

I. PROCEDURAL HISTORY

Plaintiff filed an application for SSI on August 30, 2005, alleging disability as of November 1, 2004. (Tr. 42-47). The application was denied initially (Tr. 35-37) and on reconsideration. (Tr. 31-33). Plaintiff filed a request for an administrative hearing which was held on May 14, 2007 before Administrative Law Judge Barry H. Best (the "ALJ") at which Plaintiff, represented by counsel, and a vocational expert ("VE") appeared and testified. (Tr. 345-377). On June 29, 2007, the ALJ issued a decision finding that Plaintiff was not disabled within the meaning of the Act. (Tr. 10-21). The Appeals Council denied Plaintiff's request for review on December 27, 2007. (Tr. 5-8). A timely appeal was then filed with this Court.

II. THE PARTIES' POSITIONS

Plaintiff argues that the ALJ's findings with regard to her mental impairments are not supported by substantial evidence and that the ALJ had insufficient reasons for giving reduced weight to the opinions of Dr. Parsons and Dr. LaFazia. Plaintiff also argues that the Appeals Council was eggregiously mistaken in failing to remand in light of the additional evidence submitted post-hearing.

The Commissioner disputes Plaintiff's claims and asserts that the ALJ's decision, weighing various medical source opinions, is supported by substantial evidence. The Commissioner also asserts that the Appeals Council properly declined to review Plaintiff's claims.

III. THE STANDARD OF REVIEW

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – i.e., the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as

a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Where the Commissioner's decision is supported by substantial evidence, the court must affirm, even if the court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health and Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991). The court must view the evidence as a whole, taking into account evidence favorable as well as unfavorable to the decision. Frustaglia v. Sec'y of Health and Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied).

The court must reverse the ALJ's decision on plenary review, however, if the ALJ applies incorrect law, or if the ALJ fails to provide the court with sufficient reasoning to determine that he or she properly applied the law. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991). Remand is unnecessary where all of the essential evidence was before the Appeals Council when it denied review, and the evidence establishes without any doubt that the claimant was disabled. Seavey v. Barnhart, 276 F.3d 1, 11 (1st Cir. 2001) citing, Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985).

The court may remand a case to the Commissioner for a rehearing under sentence four of 42 U.S.C. § 405(g); under sentence six of 42 U.S.C. § 405(g); or under both sentences. Seavey, 276 F.3d at 8. To remand under sentence four, the court must either find that the Commissioner's decision is not supported by substantial evidence, or that the Commissioner incorrectly applied the law relevant to the disability claim. Id.; accord Brenem v. Harris, 621 F.2d 688, 690 (5th Cir. 1980)

(remand appropriate where record was insufficient to affirm, but also was insufficient for district court to find claimant disabled).

Where the court cannot discern the basis for the Commissioner's decision, a sentence four remand may be appropriate to allow her to explain the basis for her decision. Freeman v. Barnhart, 274 F.3d 606, 609-610 (1st Cir. 2001). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. Diorio v. Heckler, 721 F.2d 726, 729 (11th Cir. 1983) (necessary for ALJ on remand to consider psychiatric report tendered to Appeals Council). After a sentence four remand, the court enters a final and appealable judgment immediately, and thus loses jurisdiction. Freeman, 274 F.3d at 610.

In contrast, sentence six of 42 U.S.C. § 405(g) provides:

> The court...may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding;

42 U.S.C. § 405(g). To remand under sentence six, the claimant must establish: (1) that there is new, non-cumulative evidence; (2) that the evidence is material, relevant and probative so that there is a reasonable possibility that it would change the administrative result; and (3) there is good cause for failure to submit the evidence at the administrative level. See Jackson v. Chater, 99 F.3d 1086, 1090-1092 (11th Cir. 1996).

A sentence six remand may be warranted, even in the absence of an error by the Commissioner, if new, material evidence becomes available to the claimant. Jackson, 99 F.3d at 1095. With a sentence six remand, the parties must return to the court after remand to file modified

findings of fact. Id. The court retains jurisdiction pending remand, and does not enter a final judgment until after the completion of remand proceedings. Id.

IV. DISABILITY DETERMINATION

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 416(I), 423(d)(1); 20 C.F.R. § 404.1505. The impairment must be severe, making the claimant unable to do her previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1505-404.1511.

A. Treating Physicians

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there is good cause to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 404.1527(d). If a treating physician's opinion on the nature and severity of a claimant's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight. 20 C.F.R. § 404.1527(d)(2). The ALJ may discount a treating physician's opinion or report regarding an inability to work if it is unsupported by objective medical evidence or is wholly conclusory. See Keating v. Sec'y of Health and Human Servs., 848 F.2d 271, 275-276 (1st Cir. 1988).

Where a treating physician has merely made conclusory statements, the ALJ may afford them such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See Wheeler v. Heckler, 784 F.2d 1073, 1075 (11th Cir. 1986). When a

treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on the (1) length of the treatment relationship and the frequency of examination; (2) nature and extent of the treatment relationship; (3) medical evidence supporting the opinion; (4) consistency with the record as a whole; (5) specialization in the medical conditions at issue; and (6) other factors which tend to support or contradict the opinion. 20 C.F.R § 404.1527(d). However, a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See 20 C.F.R. § 404.1527(d)(2).

The ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. 20 C.F.R. § 404.1527(e). The ALJ is not required to give any special significance to the status of a physician as treating or non-treating in weighing an opinion on whether the claimant meets a listed impairment, a claimant's RFC (see 20 C.F.R. §§ 404.1545 and 404.1546), or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 404.1527(e). See also Dudley v. Sec'y of Health and Human Servs., 816 F.2d 792, 794 (1st Cir. 1987).

B. Developing the Record

The ALJ has a duty to fully and fairly develop the record. Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991). The Commissioner also has a duty to notify a claimant of the statutory right to retained counsel at the social security hearing, and to solicit a knowing and voluntary waiver of that right if counsel is not retained. See 42 U.S.C. § 406; Evangelista v. Sec'y of Health and Human

Servs., 826 F.2d 136, 142 (1st Cir. 1987). The obligation to fully and fairly develop the record exists if a claimant has waived the right to retained counsel, and even if the claimant is represented by counsel. Id. However, where an unrepresented claimant has not waived the right to retained counsel, the ALJ's obligation to develop a full and fair record rises to a special duty. See Heggarty, 947 F.2d at 997, citing Currier v. Sec'y of Health Educ. and Welfare, 612 F.2d 594, 598 (1st Cir. 1980).

C. Medical Tests and Examinations

The ALJ is required to order additional medical tests and exams only when a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. § 416.917; see also Conley v. Bowen, 781 F.2d 143, 146 (8th Cir. 1986). In fulfilling his duty to conduct a full and fair inquiry, the ALJ is not required to order a consultative examination unless the record establishes that such an examination is necessary to enable the ALJ to render an informed decision. Carrillo Marin v. Sec'y of Health and Human Servs., 758 F.2d 14, 17 (1st Cir. 1985).

D. The Five-step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is working at a substantial gainful activity, she is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments which significantly limit her physical or mental ability to do basic work activities, then she does not have a severe impairment and is not disabled. 20 C.F.R. § 404.1520(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, she is disabled. 20 C.F.R. § 404.1520(d). Fourth, if a claimant's impairments do

not prevent her from doing past relevant work, she is not disabled. 20 C.F.R. § 404.1520(e). Fifth, if a claimant's impairments (considering her RFC, age, education and past work) prevent her from doing other work that exists in the national economy, then she is disabled. 20 C.F.R. § 404.1520(f). Significantly, the claimant bears the burden of proof at steps one through four, but the Commissioner bears the burden at step five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five-step process applies to both SSDI and SSI claims).

In determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments, and must consider any medically severe combination of impairments throughout the disability determination process. 42 U.S.C. § 423(d)(2)(B). Accordingly, the ALJ must make specific and well-articulated findings as to the effect of a combination of impairments when determining whether an individual is disabled. Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993).

The claimant bears the ultimate burden of proving the existence of a disability as defined by the Social Security Act. Seavey, 276 F.3d at 5. The claimant must prove disability on or before the last day of her insured status for the purposes of disability benefits. Deblois v. Sec'y of Health and Human Servs., 686 F.2d 76 (1st Cir. 1982), 42 U.S.C. §§ 416(I)(3), 423(a), (c). If a claimant becomes disabled after she has lost insured status, her claim for disability benefits must be denied despite her disability. Id.

E. Other Work

Once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. Seavey, 276 F.3d at 5. In determining whether the Commissioner has met this

burden, the ALJ must develop a full record regarding the vocational opportunities available to a claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989). This burden may sometimes be met through exclusive reliance on the Medical-Vocational Guidelines (the "grids"). Seavey, 276 F.3d at 5. Exclusive reliance on the "grids" is appropriate where the claimant suffers primarily from an exertional impairment, without significant non-exertional factors. Id.; see also Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L.Ed.2d 66 (1983) (exclusive reliance on the grids is appropriate in cases involving only exertional impairments, impairments which place limits on an individual's ability to meet job strength requirements).

Exclusive reliance is not appropriate when a claimant is unable to perform a full range of work at a given residual functional level or when a claimant has a non-exertional impairment that significantly limits basic work skills. Nguyen, 172 F.3d at 36. In almost all of such cases, the Commissioner's burden can be met only through the use of a vocational expert. Heggarty, 947 F.2d at 996. It is only when the claimant can clearly do unlimited types of work at a given residual functional level that it is unnecessary to call a vocational expert to establish whether the claimant can perform work which exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given work capacity level indicated by the exertional limitations.

1. Pain

"Pain can constitute a significant non-exertional impairment." Nguyen, 172 F.3d at 36. Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical

impairment which could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). The ALJ must consider all of a claimant's statements about his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. § 404.1528. In determining whether the medical signs and laboratory findings show medical impairments which reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

> (1) The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
>
> (2) Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);
>
> (3) Type, dosage, effectiveness, and adverse side-effects of any pain medication;
>
> (4) Treatment, other than medication, for relief of pain;
>
> (5) Functional restrictions; and
>
> (6) The claimant's daily activities.

Avery v. Sec'y of Health and Human Servs., 797 F.2d 19, 29 (1st Cir. 1986). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A).

2. Credibility

Where an ALJ decides not to credit a claimant's testimony about pain, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. Rohrberg, 26 F. Supp. 2d at 309. A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia, 829

F.2d at 195. The failure to articulate the reasons for discrediting subjective pain testimony requires that the testimony be accepted as true. See DaRosa v. Sec'y of Health and Human Servs., 803 F.2d 24 (1st Cir. 1986).

A lack of a sufficiently explicit credibility finding becomes a ground for remand when credibility is critical to the outcome of the case. See Smallwood v. Schweiker, 681 F.2d 1349, 1352 (11th Cir. 1982). If proof of disability is based on subjective evidence and a credibility determination is, therefore, critical to the decision, "the ALJ must either explicitly discredit such testimony or the implication must be so clear as to amount to a specific credibility finding." Foote v. Chater, 67 F.3d 1553, 1562 (11th Cir. 1995) (quoting Tieniber v. Heckler, 720 F.2d 1251, 1255 (11th Cir. 1983)).

V. APPLICATION AND ANALYSIS

Plaintiff was twenty-eight years old at the time of the ALJ hearing. (Tr. 42). She completed the eighth grade in special education and later attained her GED. (Tr. 75, 270). Plaintiff worked for short periods in the past as a cashier and a CNA, although not for long enough periods to be considered "past relevant work." (Tr. 20, 72). Plaintiff alleges disability due to bipolar disorder and anxiety disorder. Plaintiff also alleged a number of physical ailments which are not at issue in this appeal.

In April 1988, at the age of nine, Plaintiff's school referred her for a neurological consultation based on her "increased excitability and excessive whining and crying" with no evidence of a neurological disorder. (Tr. 96). The consultation concluded that Plaintiff possessed a "mild to moderate behavioral" disorder. (Tr. 98).

In February 2002, Kent County Mental Health Center performed an intake assessment after Plaintiff referred herself for problems with anger and stress. (Tr. 119-120). Plaintiff was noted to

be alert and oriented but reported fighting with others including her boyfriend, mother, friends and coworkers. (Tr. 119-120, 124). Plaintiff's treatment objectives were identified as decreasing her anxiety and increasing her impulse control. (Tr. 125).

Between June 2005 and April 2007, Dr. Charles Denby of West Bay Psychiatric Associates ("West Bay") treated Plaintiff for Bipolar (II) disorder. (Tr. 129-139, 229-236). In June 2005, Dr. Denby noted that Plaintiff was destructive of property in that she threw things and that her physical fights with people indicated she was a "danger to others." (Tr. 129). Dr. Denby also noted that Plaintiff had a history of racing thoughts, increased rate of speech and periods of depression. (Tr. 130). He estimated her Global Assessment of Functioning ("GAF") at 50 or serious symptoms, and that the highest for the year had been 60 or moderate symptoms. (Tr. 132). He noted that Plaintiff was oriented and that her memory, intellectual functioning, judgment and insight were intact, but that she had an irritable mood. (Tr. 131). In July 2005, Plaintiff reported to Dr. Denby that she had gotten into a pushing/punching fight with her neighbor. (Tr. 134).

At the end of August 2005, Plaintiff was showing less irritability and reported that she felt a lot better and had "reasonably good results" with Lithium. (Tr. 136). In September 2005, in response to a DDS request, Dr. Denby diagnosed Plaintiff with Bipolar II Disorder. (Tr. 137). In November 2005 Plaintiff reported that she felt like her house was "closing in"and that her heart rate was high; Dr. Denby assessed that she was having a "recurrence of panics." (Tr. 229). In February 2006, Plaintiff reported that she tried not to leave the house and had anxiety attacks. (Tr. 231). In March 2006, Plaintiff reported that although she was experiencing headaches as a side effect of her medication, her mood had improved and she had fewer panic attacks. (Tr. 232). In July 2006, Plaintiff reported that she was doing "much better," no longer slept all day, and had fewer panic

attacks. (Tr. 234). Dr. Denby noted she was doing "much better on [the antidepressant drug] Effexor." (Tr. 234). In April 2007, Plaintiff reported to Dr. Denby that she was angry at everyone and had low energy. (Tr. 235).

From September 2004 to December 2005, Dr. Frank LaFazia, Plaintiff's primary care physician, treated her for a cough, bronchitis, depression and anxiety, among other ailments. (Tr. 184-194, 237-248). In November 2004, Dr. LaFazia began prescribing Tranxene, an anti-anxiety medication. (Tr. 186). In May and September 2005, Dr. LaFazia noted Plaintiff had bipolar disorder. (Tr. 189, 192). In March 2007, Dr. LaFazia noted Plaintiff's depression and also noted that she was off all of her psychiatric medications apparently for financial reasons. (Tr. 248). In April 2007, Dr. LaFazia noted in a Medical Questionnaire that Plaintiff had bipolar disorder and depression and that because of these impairments, she was incapable of performing sustained, competitive full-time employment. (Tr. 263-265). He also noted that although Plaintiff had severe mood swings, her symptoms were controlled with medication. (Tr. 263). Dr. LaFazia indicated that Dr. Denby should be asked about Plaintiff's ability to work. (Tr. 266).

In May 2007, at the request of her attorney, Dr. John Parsons generated a psychological evaluation for Plaintiff. (Ex. 22F). Among his findings, Dr. Parsons noted that Plaintiff's "attention and concentration spans were impaired, but she was oriented to person, place and time," while rating her GAF at 48 or serious symptoms. (Tr. 273-274). He opined that Plaintiff was chronically depressed and possessed "a number of borderline personality features." (Tr. 273). He diagnosed her with panic attacks, Bipolar II Disorder, Most Recent Episode Depressed, Panic Disorder without Agoraphobia, Eating Disorder not otherwise specified, pathological gambling and nicotine dependence. (Tr. 274). Dr. Parsons noted that Plaintiff found her medications "somewhat helpful."

(Tr. 270). He also noted that she "has friends she sees on occasion but spends most of her day at home watching television or movies." (Tr. 271). He found that Plaintiff "withdraws from everyday activities and is emotionally apathetic....She does not respond well to supervisors, coworkers, or people in general." (Tr. 273, 275).

Dr. Parsons concluded his evaluation with his opinion that Plaintiff was "not capable of maintaining gainful employment on a sustained basis because of the severity of her psychiatric problems," further stating that her "difficulties prevent her from dealing appropriately with the typical pressures in a work setting." (Tr. 275). He also completed a questionnaire in which he opined that Plaintiff suffered moderately severe limitations in activities of daily living, ability to relate to other people, including coworkers, and the ability to perform varied tasks. (Tr. 276-277). He also found Plaintiff severely limited in her ability to respond to supervision, to respond to customary work pressures and to perform complex tasks. (Tr. 276).

On September 5, 2006, Plaintiff reported during a visit to Kent Hospital that she had stopped taking Lithium two months ago. (Tr. 308, 310). Emergency records from September 26, 2006 noted that Plaintiff was oriented and had a normal mood. (Tr. 318).

On May 17, 2007, Dr. Denby filled out an emotional impairment questionnaire and diagnosed Plaintiff with Bipolar (II) disorder, and reported that her symptoms were "irritable/unstable moods, agitation, variable insomnia." (Tr. 342). He rated Plaintiff's symptoms as moderate and determined that Plaintiff was not capable of sustaining competitive, full-time employment on an ongoing basis. (Tr. 343). The ALJ did not have this questionnaire before him when, on June 29, 2007, he issued his unfavorable decision. (Tr. 8). The questionnaire was forwarded to the Appeals Council as an attachment to a letter from Plaintiff's attorney dated August

15, 2007. (Tr. 344). Thus, the Appeals Council had Dr. Denby's questionnaire before it when it denied Plaintiff's request for review, finding the questionnaire did "not provide a basis for changing the [ALJ's] decision." (Tr. 6, 342-344).

In support of her SSI application, Plaintiff completed a Function Report on September 14, 2005 in which she reported her daily activities and the nature of her abilities. (Tr. 55-62). She reported that she was irritable, had trouble falling asleep and that her ability to get along with others was affected by her illnesses. (Tr. 56, 60). She also reported that she vacuumed, swept, cooked, did the dishes, cleaned counters, and did the laundry. (Tr. 57). She stated that she spent time with her mother daily, although she also stated she no longer liked to go out with friends. (Tr. 59, 60). She also felt angry because she felt like everyone was trying to control how she thought or did things. (Tr. 60).

In October 2005, Dr. MaryAnn Paxson, a state agency Psychologist, completed a mental Residual Functional Capacity ("RFC") form in which she assessed Plaintiff had no more than moderate functional limitations, concluding that Plaintiff was able to understand, remember and carry out "1-2-3 step, familiar repetitive tasks" and maintain her attention for two-hour periods throughout an eight-hour day. (Tr. 140-142). She also determined that Plaintiff's interpersonal difficulties would prevent her from working with the public or closely with coworkers. (Tr. 142). Finally, she noted that Plaintiff's mood improved when she took her medication. Id.

In March 2006, Dr. Joseph Litchman, a state agency Psychologist, completed a Psychiatric Review Technique Form and a mental RFC form. (Exs. 10F and 11F). Dr. Litchman determined that Plaintiff had "waxing/waning" bipolar disorder with at least partial response to medicine and

"better control than not." (Tr. 208, 212). He also concluded that the "ADL's are credible in detailing" her interpersonal difficulties. (Tr. 208).

A. The ALJ's Evaluation of the Medical Evidence Regarding Plaintiff's Bipolar and Anxiety Disorders is Supported by Substantial Evidence

The ALJ found Plaintiff's bipolar and anxiety disorders to be "severe" impairments within the meaning of 20 C.F.R. § 416.920(c), but not of "Listing-level" severity. (Tr. 15-16). The ALJ also found certain physical impairments to be severe and assessed an RFC for light work with postural and environmental limitations. (Tr. 16). The ALJ also found nonexertional limitations related to Plaintiff's mental impairments, specifically moderate limitations in concentration, persistence and pace, and in dealing appropriately with the public, coworkers and supervisors. Id. Ultimately, the ALJ ruled against Plaintiff at Step 5 and, based on testimony from the VE, determined that Plaintiff is capable of performing the requirements of various light, unskilled positions existing in substantial numbers. (Tr. 21).

In his decision, the ALJ favored the opinion of Dr. Joseph Litchman, a state agency Psychologist, (Exs. 10F and 11F) over the opinions of Dr. John Parsons, an examining Psychologist retained by Plaintiff's counsel, (Ex. 22F) and Dr. Frank LaFazia, Plaintiff's primary care physician (Ex. 20F). (See Tr. 19-20). Dr. Litchman reviewed the relevant medical record and completed a psychiatric review technique form and a mental RFC assessment on March 2, 2006. As accurately noted by the ALJ, Dr. Litchman only found support for moderate limitations in Plaintiff's concentration, persistence and pace, and social functioning, and mild limitations in daily activities. (Tr. 19-20, 206). Dr. Litchman opined that Plaintiff could carry out and understand "1+2 step

instructions," complete simple tasks, be socially appropriate with co-workers and supervisors in a simple routine, and adjust to small changes in such routine. (Tr. 210-212).

Plaintiff does not, and cannot, argue that the ALJ's mental RFC findings are unsupported by Dr. Litchman's opinions. Rather, Plaintiff argues that the ALJ erred by relying on Dr. Litchman's opinions because they were outdated. (Document No. 9 at p. 10). In particular, Plaintiff contends that Dr. Litchman had not seen "a great deal of records from West Bay." Id. However, the record reveals that Plaintiff went to West Bay just three times (March 21, 2006, July 6, 2006 and April 19, 2007) after Dr. Litchman rendered his opinion. (See Tr. 232-235). Further, these records are relatively unremarkable, primarily noting improvement with some anger issues noted in prior records reviewed by Dr. Litchman. (Tr. 129, 134). While the passage of time by itself does not render reliance on a medical report erroneous, this Court has ordered remand in past cases where substantial changes in the medical history of a claimant would reasonably call into question the continuing reliability of early medical opinions. See, e.g., St. Pierre v. Barnhart, No. 06-095LDA, Memorandum and Order (D.R.I. March 15, 2007) (ALJ erred by giving substantial weight to "early" state agency physician opinions where claimant was struck by a car and injured thereafter and had substantial additional medical and psychological treatments). See also Alcantara v. Astrue, No. 07-1056, 2007 WL 4328148 at *1 (1st Cir. Dec. 12, 2007) (per curiam) (ALJ erred, in part, by relying on the "early" opinion of a non-examining psychologist who opined before the death of clamant's father and thus could not have adequately considered the resulting deterioration in claimant's mental condition). There is simply nothing in these later medical records which calls into question the relevance of Dr. Litchman's opinions at the time of the ALJ's decision.

As to Dr. Parsons, Plaintiff contends that it was erroneous for the ALJ to reject his opinion because his evaluation was arranged and "secured by [Plaintiff's] attorney in pursuit of the disability benefit." (Tr. 20). The Court need not address this argument as the ALJ noted, "in any event," alternative reasons for his evaluation of Dr. Parsons' opinion which are supported by the record. First, the ALJ accurately noted that Dr. Parsons' one-time evaluation of Plaintiff was "not generated in the course of treatment." Id. Second, and more importantly, the ALJ accurately noted that Dr. Parsons' opinion is "inconsistent with other substantial evidence of record." Id. While Dr. Parsons found Plaintiff to be moderately severely to severely limited in most areas (Tr. 276-277), West Bay's records indicated improvement (Tr. 232, 234) and Dr. LaFazia noted severe symptoms "but controlled with meds." (Tr. 263). Dr. Parsons also relied upon his belief that Plaintiff socialized only "on occasion" and tended to "socially isolate" (Tr. 271, 273) but Plaintiff testified that she had three friends she sees daily and who assist her with cooking and cleaning. (Tr. 366-367). Finally, Dr. Parsons' opinions conflicted with those of Dr. Litchman and Dr. Paxson. Plaintiff has shown no error in the ALJ's assessment of Dr. Parsons' opinion.

Plaintiff also argues that the ALJ should have considered the fact that Dr. Parsons' opinions were consistent with those of Dr. LaFazia. Because a treating physician is typically able to provide a detailed longitudinal picture of a patient's impairments, an opinion from a treating source is generally entitled to considerable weight if it is well supported by clinical findings and not inconsistent with other substantial evidence of record. 20 C.F.R. § 404.1527(d); see also Castro v. Barnhart, 198 F. Supp. 2d 47, 54 (D. Mass. 2002) (The ALJ "may reject a treating physician's opinion as controlling if it is inconsistent with other substantial evidence in the record, even if that evidence consists of reports from non-treating doctors."). The amount of weight to which a treating

source opinion is entitled depends in part on the length of the treating relationship and the frequency of the examinations. 20 C.F.R. § 404.1527(d)(1). If a treating source's opinion is not given controlling weight, the opinion must be evaluated using the enumerated factors and "good reasons" provided by the ALJ for the level of weight given. 20 C.F.R. § 404.1527(d)(2).

Plaintiff has shown no error in the treatment of Dr. LaFazia's opinion. (Ex. 20F). First, as noted by the ALJ, Dr. LaFazia's conclusory opinion on the ultimate issue of disability is not controlling. (Tr. 20; 20 C.F.R. § 416.927(d), (e)). Second, Dr. LaFazia is not a psychiatrist or psychologist and was primarily treating Plaintiff for her various physical ailments. 20 C.F.R. § 416.927(d)(5). Third, although Dr. LaFazia wrote prescriptions for antidepressants, his treatment records do not note the severity of Plaintiff's mental impairments other than conclusory diagnoses of bipolar disorder and anxiety. (See, e.g., Tr. 184-189, 192, 248); see also 20 C.F.R. § 416.927(d)(3). Finally, Dr. LaFazia's disability opinion was qualified in two respects – he noted that Plaintiff's symptoms were "controlled" with medications and indicated the need to consult Plaintiff's psychiatrist, Dr. Denby. (Tr. 263, 266).

Plaintiff essentially asks this Court to step into the ALJ's shoes and re-weigh the medical evidence. However, in this administrative appeal, the issue is not whether this Court would have reached the same conclusion had it been responsible for reviewing this case in the first instance. Rather, the issue is whether the ALJ's mental RFC finding is supported by substantial evidence and legally correct. See Rodriguez-Pagan v. Sec'y of HHS, 819 F.2d 1, 4 (1st Cir. 1987) ("it is the [ALJ's] province to resolve conflicts in the medical evidence."). See also Benetti v. Barnhart, 193 Fed. Appx. 6, 2006 WL 2555972 (Sept. 6, 2006) ("The ALJ's resolution of evidentiary conflicts

must be upheld if supported by substantial evidence, even if contrary results might have been tenable also."). Plaintiff has shown no error.

B. Plaintiff Has Not Presented a Reviewable Appeals Council Decision

Plaintiff also contends that the Appeals Council erred in refusing to remand based upon additional evidence submitted after the ALJ's decision. (Tr. 8, 342-344). In particular, Plaintiff points to an emotional impairment questionnaire completed by Dr. Denby of West Bay on May 17, 2007. (Tr. 342-343). Plaintiff asserts that the Appeals Council erred by not remanding this case to the ALJ to consider this additional evidence or "at the very least [it] should have explained its reasoning in rejecting it."[1] (Document No. 9 at p. 11).

Generally, the discretionary decision of the Appeals Council to deny a request for review of an ALJ's decision is not reviewable. A judicial review under 42 U.S.C. § 405(g) is typically focused on the findings and reasoning of the ALJ, i.e., whether the ALJ's findings are supported by substantial evidence and whether the ALJ properly applied the law. Of course, it makes no sense from an efficiency standpoint for a reviewing court to spend time and resources critiquing the work of the Appeals Council when it has jurisdiction to review the underlying and operative ALJ decision. In other words, reversible error by an ALJ can be remedied by the Court regardless of what the Appeals Council did or did not do.

---

[1] Plaintiff has provided no persuasive authority for his argument that remand to the Appeals Council is required because of a failure to adequately explain its reasoning. Such a rule would result in automatic remands in most cases since the Appeals Council often does not, and is not required to, provide a detailed explanation of its decisions. See Waters v. Astrue, 495 F. Supp. 2d 512, 514-515 (D. Md. 2007) (failure of Appeals Council to explain how it evaluated new evidence presented to it does not require remand). In addition, pursuant to his ethical duty of candor towards the Court (R.I. Rules of Prof. Conduct, Rule 3.3(a)(2)), Plaintiff's counsel neglected to advise the Court that it has rejected this exact same argument made by him in at least two prior cases (Kirby v. Astrue, C.A. No. 07-422A and Jette v. Astrue, C.A. No. 07-437A). While Plaintiff's counsel as an advocate, of course, is not obligated to abandon this argument, he should bring this directly adverse precedent to the Court's attention and, rather than repeat a failed argument, explain why he believes the Court's reading of Mills is mistaken.

The First Circuit has, however, held that review of Appeals Council action may be appropriate in those cases "where new evidence is tendered after the ALJ decision." Mills v. Apfel, 244 F.3d 1, 5 (1st Cir. 2001). In such cases, "an Appeals Council refusal to review the ALJ may be reviewable where it gives an egregiously mistaken ground for this action." Id. This avenue of review has been described as "exceedingly narrow." Harrison v. Barnhart, C.A. No. 06-30005-KPN, 2006 WL 3898287 (D. Mass. Dec. 22, 2006). Further, the term "egregious" has been interpreted to mean "[e]xtremely or remarkably bad; flagrant." Ortiz Rosado v. Barnhart, 340 F. Supp. 2d 63, 67 (D. Mass. 2004) (quoting Black's Law Dictionary (7th ed. 1999)).

Here, the Appeals Council issued a "boiler plate" denial of Plaintiff's Request for Review. (Tr. 5-7). It noted that the "additional evidence" submitted by Plaintiff was considered, and it concluded that such evidence did "not provide a basis for changing the [ALJ's] decision." (Tr. 5-6). The additional evidence is not substantively discussed by the Appeals Council. Plaintiff contends that the Appeals Council's failure to articulate its reasoning makes it impossible to apply the "egregious mistake" standard.

While Plaintiff's point has some appeal at first blush, it is exposed as flawed when you look closely at the First Circuit's reasoning in Mills. In Mills, the First Circuit recognized that an Appeals Council denial of a request for review has all the "hallmarks" of an unreviewable, discretionary decision. Mills, 244 F.3d at 5. The Appeals Council is given a great deal of latitude under the regulations and "need not and often does not give reasons" for its decisions. Id. Thus, the First Circuit "assume[d] that the Appeals Council's refusal to review would be effectively unreviewable if no reason were given for the refusal." Id. at p. 6. It did, however, create a narrow exception for review when the Appeals Council "gives an egregiously mistaken ground for [its]

action." Id. at p. 5. The First Circuit did not find this result to be a "serious anomaly" because "there is reason enough to correct an articulated mistake even though one cannot plumb the thousands of simple 'review denied' decisions that the Appeals Council must issue every year." Id. at p. 6. Plaintiff's argument is basically an attempt to turn the narrow Mills rule inside/out.

Since Plaintiff proffered the "new" evidence to the Appeals Council, it is undisputed that the Mills test, and not the more forgiving Evangelista test, applies. See Ortiz Rosado, 340 F. Supp. 2d at 67 n.1. Plaintiff has not established that the Appeals Council was "egregiously mistaken" in its decision to deny Plaintiff's request for review. Dr. Denby's opinion is dated May 17, 2007 (three days after the ALJ hearing and several weeks before his decision) and thus Plaintiff could easily have submitted it to the ALJ before he issued his decision. He did not do so, and the Court must review the ALJ's decision based on the record before him at the time. Further, although the ALJ did not have the opportunity to consider such opinion, he did have all or most of the underlying records when he rendered his decision. Plaintiff has shown no error.

VI. CONCLUSION

For the reasons stated above, I order that the Commissioner's Motion for an Order Affirming the Decision of the Commissioner (Document No. 11) be GRANTED and that Plaintiff's Motion to Reverse the Decision of the Commissioner (Document No. 9) be DENIED. Final judgment shall enter in favor of the Commissioner.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
February 23, 2009